IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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FATPIPE, INC.

Plaintiff,

v

VIPTELA, INC.,

Defendant.

: CIVIL ACTION NO.

: 16-182-LPS-CJB

- - -

Wilmington, Delaware
Friday, September 2, 2016
Telephone Conference

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BEFORE: HONORABLE **LEONARD P. STARK**, Chief Judge

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APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: BINDU A. PALAPURA, ESQ.

and

PERKINS COIE, LLP
BY: STEVEN M. LUBEZNY, ESQ.
(New York, New York)

Counsel for Plaintiff

MORRIS NICHOLS ARSHT & TUNNELL, LLP
BY: RODGER D. SMITH, II, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

APPEARANCES: (Continued)

McGuireWOODS, LLP
BY: JASON W. COOK, ESQ., and
SHAUN W. HASSETT, ESQ.
(Dallas, Texas)

and

McGuireWOODS, LLP
BY: RACHELLE H. THOMPSON, ESQ.
(Raleigh, North Carolina)

Counsel for Defendant

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 1:16 p.m.)

THE COURT: Good afternoon, everybody. This is Judge Stark. Who is there, please?

MR. SMITH: Good afternoon, Your Honor.

MS. PALAPURA: Good afternoon, Your Honor. This is -- good afternoon, Your Honor. Bindu Palapura from Potter Anderson on behalf of plaintiff, FatPipe. With me is Steven Lubezny from Perkins Coie.

MR. LUBEZNY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SMITH: Good afternoon, Your Honor. Rodger Smith at Morris Nichols on behalf of defendant Viptela. I'm joined by my co-counsel from McGuireWoods, Rachelle Thompson, Jason Cook, and Shaun Hassett; and Ms. Thompson is prepared to address the issues today, Your Honor.

THE COURT: Okay. Good afternoon to all of you.

I have my court reporter here with me. And for our record, it is our case of FatPipe Inc. versus Viptela Inc., Civil Action No. 16-182-LPS-CJB. This is the time we set to talk about the dispute over the provision in the protective order.

We received defendant's letter first, so let me hear from defendant first, please.

MS. THOMPSON: Good afternoon, Your Honor. This is Rachelle Thompson on behalf of Viptela.

This case, Your Honor, is a case between two direct competitors; and in the PO, Your Honor, we have three levels of designation. We have an outside counsel only designation for highly confidential information, we have a highly confidential source code designation, and we have a confidential designation.

The dispute today, Your Honor, relates to the third designation, the confidential designation and who at the client, Your Honor, should be allowed to see the confidential information.

Viptela proposal is that the confidential information should be limited to in-house counsel who are not involved in competitive decisionmaking; in particular, only one in-house counsel, Your Honor.

FatPipe, on the other hand, would expand that to include any representative of FatPipe. So it is not limited to in-house counsel, and it is also not limited to people who are involved in competitive decisionmaking.

That being said, Your Honor, this case is completely different because at least we have allegations where at least one person at FatPipe contacted Viptela's prospective customers regarding the service that is at issue in this case for direct competitors. So in addition to case law which generally limits the disclosure of confidential information to people at companies that are not involved in competitive decisionmaking, we have an additional concern here, Your Honor, where at least we have evidence that at least one person at FatPipe has already contacted our competitors.

Let me say at the outset, Your Honor, we are not asking for a provision here that is manifestly unfair. We're not asking for a provision that would not similarly apply to Viptela as it applies to FatPipe. Viptela does not have any in-house counsel. No representative at Viptela is interested in seeing FatPipe's confidential information.

We have another provision in the protective

order, provision 6(c), that allows counsel for each party to advise their clients accordingly as long as we do not disclose the contents of that confidential information. We think that provision provides more than fair, more than adequate protection for the attorneys here to advise clients on this matter.

THE COURT: Let me stop you there.

So Viptela also does not have any in-house counsel you said; is that right?

MS. THOMPSON: That is correct, Your Honor.

THE COURT: So what would your position be on the protective order simply saying nobody who is in-house on either side, be they counsel or not, should get access to the confidential information?

MS. THOMPSON: The reason why we inserted the in-house provision, Your Honor, is that during the pendency of this case, both parties may end up engaging in-house counsel. And though we're not able to predict that, we at least wanted to have that as a safeguard, just in case circumstances change.

THE COURT: Well, the plaintiff I think raises the concern that the plaintiff entity as a whole will not be able to be meaningfully involved in the litigation with your provision. It sounds as if your client is prepared to not be meaningfully involved in the litigation; is that correct?

MS. THOMPSON: That is correct, Your Honor. And if Your Honor was inclined to say that for confidential information, no one at either party could see it, Viptela would not object.

THE COURT: In terms of, I think I understand why you don't want, if there is going to be a provision like this, why you don't want the person who gets access to the confidential information to be a competitive decisionmaker.

Why, in addition to that restriction, does it have to be limited to an attorney?

MS. THOMPSON: Because, Your Honor, we think at least with attorneys, there are special safeguards in place. Attorneys understand their role in terms of reviewing confidential information on the protective order, and there is less risk, Your Honor. It is less likely that an attorney would reach out to a potential customer for either party and rely on the information they saw that was confidential in their interactions with potential customers, Your Honor.

THE COURT: FatPipe also makes the suggestion that you don't really have much to worry about even under their provision because whoever they designate won't have access to your highly confidential information and as long as your side is careful with your designations, it's not really likely that you are going to produce anything that

could come back to harm you. What is your response to that?

MS. THOMPSON: Thank you, Your Honor.

We think that that suggestion, Your Honor, does not provide a cure. We think it will lead to additional peripheral side issues where parties are going to be disputing whether or not certain information was properly designated.

We, as a party, cannot just designate everything that is highly confidential to avoid the consequence of a representative at FatPipe seeing information. We should only designate highly confidential information as such if it truly is highly confidential information, Your Honor.

If we follow FatPipe's suggestion, I can see down the road we're going to be back before you, arguing over designation issues over who at FatPipe should be able to see confidential information, and creating the safeguard in a place right now, Your Honor, would just lead to efficiencies of this case.

THE COURT: Can you give me an example of the type of document that would be properly designated as confidential but that if inadvertently was used by a competitive decisionmaker at FatPipe could injure you in a way that I should be concerned about?

MS. THOMPSON: Yes, Your Honor. One example, and this is without waiver of our rights to change the designation

on information of this nature, would be marketing information, Your Honor.

Our client is a small product company. To the extent there is marketing information out there that the CEO of FatPipe reviews and that CEO already contacted potential customers of Viptela, when the CEO talked to that customer, the CEO cannot unlearn or unsee what he has already seen as confidential information at Viptela, and that person at FatPipe could rely on that information, even without intending to do so, in dealing with potential customers where here the parties are directly competing in the same technical space.

THE COURT: Okay.

MS. THOMPSON: That would be contrasted with something like technical information, Your Honor, which under the PO would be designated as highly confidential, and that technical information would not fall in the hands of a representative at FatPipe.

THE COURT: Okay. Thank you very much.

Let me hear from the plaintiff now.

MR. LUBEZNY: Good afternoon, Your Honor. This is Steve Lubezny from Perkins Coie.

In general, our position is, as Ms. Thompson noted, there are already multiple levels of designation in this protective order. We have got the highly confidential level for documents that are of a sensitive nature and we

have the regular confidential level.

If we remove this provision -- limit this provision to where representatives of FatPipe effectively cannot see the confidential information, we basically collapse those two levels into one. There is no difference in them. The rest of the requirements are identical as to who can see those documents.

So the reason for these two levels of designations is to allow the parties to have meaningful input and meaningful ability to participate in litigation strategy with regards to that kind of information. And, you know, based on our experience, based on our expectations in this case, a significant amount of especially the briefing and arguments and memorandum and briefs in this case will revolve around a lot of confidential information that is not of any kind -- not significantly sensitive, commercially sensitive in nature. And in our view, that is the kind of information that the parties should be allowed to have a representative participate in.

As you noted before, Your Honor, FatPipe does not have an in-house counsel, so that provision in effect eliminates FatPipe's ability to participate in the litigation. They do want to participate, they do want to have the ability to have input on the strategy, and so we think removing that allowance for them is not a proper way

to go.

THE COURT: Does FatPipe have anybody in-house who would not be considered a competitive decisionmaker?

MR. LUBEZNY: Your Honor, there really is not such a person. FatPipe is not a humongous company. There are two founders of the company that basically oversee the day-to-day operations that are the ones that are involved with the litigation, and that is basically the CEO of the company and the CTO of the company. So one of them will effectively need to be the representative. They are the two people that are kind of involved in this issue.

THE COURT: But isn't there then, unfortunately, I suppose a very real possibility that the confidential information could be inadvertently misused as they are exercising their authority to make competitive decision-making, including in a field in which you are a direct competitor of the defendant?

MR. LUBEZNY: Well, Your Honor, I think the issue with that is -- the answer to that is what we raised in our letter, and that really comes down to the reason we have the two levels of confidentiality here.

Anything that there is a concern about that could impact the compensation between the parties -- the technical information, information about costs, information about customers, that all should be labeled as highly

confidential, and that eliminates the concern.

Obviously, Viptela is FatPipe's customer as well and FatPipe would have the same kind of concerns on our end as well. There is certainly information FatPipe would not want a Viptela representative, whether or not it is an in-house counsel or otherwise, seeing.

But there is plenty of other confidential information labeled confidential that is not of a sensitive nature that is not going to lead to any kind of competitive issues and that will still likely permeate a lot of the briefing and issues in this case. And we believe the creation of a lower tier allows the parties to at least meaningfully participate and see that information.

THE COURT: Well, what about the marketing example that Ms. Thompson gave us? It seems that that could potentially be inadvertently misused to hurt them. Do you disagree with that?

MR. LUBEZNY: Well, I do to some extent.

Obviously, these parties are competitors. I would expect they know already full well what the other's marketing materials and marketing information is. That is information given to third parties. As a matter of course, that's in some ways public to begin with.

Now, to the extent if Ms. Thompson is talking about specific communications of perspective customers that

hasn't been made public yet, well, I would argue that that is something that falls into a highly confidential tier as it goes toward prospective customer communications.

THE COURT: Well, what about her concern that you're essentially inviting them to overdesignate confidential information as highly confidential and that that ultimately is likely to lead to disputes between the parties and then probably disputes in front of me?

MR. LUBEZNY: Well, I have two thoughts on that. One is we have multiple designations in the protective order already, and so given these types of protective orders, there is always some type of possibility there is going to be a dispute about designations regardless, so that possibility doesn't necessarily go away here.

Two, I don't believe we're in a -- you know, at least from our end, our client is not realistically looking to be pouring through production of documents. What they're most interested in is wanting the ability to see briefing and be able to see arguments and not be foreclosed on that front.

And so I think the likelihood of disputes is not nearly that high unless it really relates to very specific documents that end up in briefs before this court.

THE COURT: Ms. Thompson alluded to some other provision that is agreed upon in the protective order

whereby perhaps you could request the opportunity to show somebody a document they otherwise might not see. I may have misunderstood that, but is there some other provision that might address what you have just asked or referenced? And if not, might the best way to handle this be to add a provision? If what is important is attending arguments and seeing briefs, perhaps you all could craft something that would be more focused on that, Mr. Lubezny.

MR. LUBEZNY: Yes. Let me address the first question first.

I believe the provision Ms. Thompson is referring to is simply one that allows counsel to advise, outside counsel to advise the client about the litigation.

That provision doesn't have anything in it that I'm aware of that would allow outside counsel to provide any confidential information or go beyond what the permitted scope of disclosure is. So I don't believe that actually adds anything to what we're talking about here. Outside counsel is still limited and would be unable to give any detailed description or analysis if the information was confidential and not allowed to be disclosed to the client representative.

As for whether or not there is something we could craft in that regard, I guess the answer is I'm not sure. It just seems to me as if that would end up kicking

the ball down the road to where every time somebody files some confidential information, we necessarily then end up in a dispute about can we now disclose it to a corporate representative, and I feel like we will be back where we started given Viptela's current position which is they don't want a corporate representative to see any confidential information.

THE COURT: Well, I guess I'm looking at the definition of what you all have agreed to as what should be designated confidential. It looks like it's paragraph 8(a): Confidential means it contains or reflects confidential proprietary and/or commercially sensitive information.

That sounds like the kind of information that ordinarily we would not want a competitive decisionmaker to have access to because it could inadvertently be used to hurt a competitor.

Tell me why that thinking shouldn't apply here.

MR. LUBEZNY: Well, again, Your Honor, I think that those definitions are meant to be broad in that confidential information can't contain that and obviously highly confidential information is meant for information that is additionally sensitive.

From our end, if Viptela thinks it would help avoid disputes, we are certainly agreeable to tweaking this definition to make it clear that commercially sensitive

information should go into the higher tier. We would have no concerns about doing that.

But, in general, this was simply meant to be a broad definition to include anything that a party can choose to put into the confidential tier.

THE COURT: Is there anything else, Mr. Lubezny?

MR. LUBEZNY: Nothing from our end. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Ms. Thompson, is there anything else?

MS. THOMPSON: Just one last point, Your Honor.

Counsel for FatPipe said that what his client was most interested in is, for example, the briefing.

I just want to point out that this Court has a redaction process and the filing party is the party who is actually responsible for filing the redacted copy, and that copy can be shared with clients.

From our end, our client is perfectly willing to allow us to advise them directly without disclosing the confidential information, is not interested in seeing any confidential information, and so we are not asking the Court to do anything that Viptela itself is not willing to do as well, Your Honor.

THE COURT: Mr. Lubezny, is there anything else?

MR. LUBEZNY: No, Your Honor. Nothing else from

our end.

THE COURT: Well, thank you for the helpful argument.

On this one, I find myself ultimately on the side of the defendant, and so I direct that the parties submit jointly a version of the protective order that reflects my siding with the defendant on this disputed provision and get that to me by next Wednesday and I will sign that.

I just simply think that there is a risk here of inadvertent misuse of, in this instance, Viptela's confidential information by FatPipe's competitive decisionmaker.

The fact that the competitive decisionmaker could be a non-attorney heightens the concern. I don't even need to reach that, but the fact is that FatPipe only has and only proposes that it be a competitive decisionmaker who would have access if I were to take FatPipe's proposal to confidential information of the defendant. And as I noted during the discussion, confidential information, it is a very broad definition the parties have agreed to.

It contains "anything that contains or reflects confidential, proprietary and/or commercially sensitive information." That would seem to include at least marketing information, to include things that could be nonpublic marketing materials, for instance, things that are being

developed or strategies. And it may well be that in good faith, Viptela feels that that is confidential information but not highly confidential, and if so, that's the kind of material that, again, I don't think it is pure speculation. I think given limitations on human beings inherently and being able to separate out information they know for certain limited purposes, it just seems actually quite likely that if that type of confidential information was known to the competitive decisionmakers, the CEO or the CTO at FatPipe, that that could lead to inadvertent harmful misuse in a way that Viptela, as a direct competitor of FatPipe, should not have to risk simply as a result of being sued by FatPipe.

I think what further confirms that this is the right decision is it is equally burdensome to both of the entities that are in front of me. Both will have the same limits on how involved in-house individuals can be in the litigation and in how much they're going to have to rely on their outside counsel to litigate.

So, again, my decision is for the defendant.

Are there any questions about any of that, Ms. Thompson?

MS. THOMPSON: No, Your Honor.

THE COURT: Mr. Lubezny?

MR. LUBEZNY: No, Your Honor. Thank you.

THE COURT: Thank you all very much. Have a

nice weekend. Good-bye.

(Telephone conference ends at 1:41 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court